

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 10, 2001

**TIMOTHY V. BOWLING v. TENNESSEE BOARD OF PAROLES, ET AL.**

**Appeal from the Chancery Court for Davidson County**  
**No. 00-1035-II Carol McCoy, Chancellor**

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**No. M2001-00138-COA-R3-CV - Filed April 30, 2002**

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This appeal involves a prisoner's efforts to be paroled. After a hearing officer employed by the Tennessee Board of Paroles declined to recommend him for parole, the prisoner filed a pro se petition for a common-law writ of certiorari in the Chancery Court for Davidson County asserting that the procedures used to consider him for parole violated his due process and equal protection rights and were tainted by delay and bias. Instead of filing the record of the challenged proceedings, the Board filed a Tenn. R. Civ. P. 12.02(6) motion to dismiss. The trial court granted the Board's motion, and the prisoner has appealed. We have determined that the prisoner's petition should have been dismissed because it does not comply with Tenn. Code Ann. § 27-8-106 (2000) and because it does not present facts demonstrating that the prisoner had no other plain, speedy, or adequate remedy when he filed the petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated in Part  
and Affirmed in Part**

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Timothy V. Bowling, Mountain City, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Kimberly J. Dean, Deputy Attorney General, for the appellee, Tennessee Board of Probation and Parole.

**OPINION**

**I.**

Timothy Varnell Bowling and Sonya Price had a twelve-year, extra-marital relationship that produced two children. Their relationship had deteriorated so much by 1990 that Ms. Price was required to move into a separate residence and to seek an order of protection for herself and the

parties' children. In April 1994, following the testimony of Ms. Price and one of her children, Mr. Bowling plead guilty in the Criminal Court for Washington County to two counts of felony non-support and one count of stalking. He received probation for these offenses.

Soon after the April 1994 hearing, Mr. Bowling began telephoning Ms. Price with threats against her and the children. Fearing Mr. Bowling, Ms. Price took her children to Illinois to live with her mother. She was also afraid to remain in her house, and so she stayed with friends and at a Salvation Army shelter. On the morning of May 23, 1994, Ms. Price was informed by fire and arson investigators that her house had been burned down. When she arrived at her house, she discovered that three of her four cats had died in the fire and that her bedroom had been ransacked and her clothes "cut up" in pieces. She also received a letter in Mr. Bowling's handwriting stating "For now, I am the teacher, and I am the preacher. When I am done with your mind you will know what you have learned. You will know what it means to be . . . burnt."

Following a mistrial in January 1995, Mr. Bowling was retried, and on March 21, 1995, a Washington County jury convicted him of arson. In June 1995, the criminal court sentenced Mr. Bowling as a Range II multiple offender to serve a ten-year sentence. The Tennessee Court of Criminal Appeals affirmed this conviction.<sup>1</sup> After unsuccessfully attempting to sue two of the officers who arrested him,<sup>2</sup> Mr. Bowling turned his attention to obtaining a parole.

Mr. Bowling was first considered for parole in April 1997. He was not released at that time and was told that he would be considered again in two years. Another hearing, originally scheduled for April 1999, was continued to May 1999 to notify Ms. Price that Mr. Bowling was again being considered for parole. At the conclusion of the May 5, 1999 hearing, the hearing officer continued the proceeding for four months to complete a prerelease investigation. When the hearing reconvened on September 9, 1999, the hearing officer informed Mr. Bowling that she had determined that his proposed housing arrangements and work plan would place him in close contact with his two brothers who were also on parole. Accordingly, the hearing officer decided against recommending Mr. Bowling for parole because of the seriousness of his offense and the risk that he would commit new crimes because of his close relationship with his brothers.

In October 1999, Mr. Bowling "appealed" to the Tennessee Board of Paroles. On April 3, 2000, after receiving no response from the Board, Mr. Bowling filed a petition for a common-law writ of certiorari in the Chancery Court for Davidson County asserting that the hearings in May and

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<sup>1</sup>*State v. Bowling*, No. 03C01-9805-CR-00167, 1999 WL 782470 (Tenn. Crim. App. Sept. 28, 1999) (No Tenn. R. App. P. 11 application filed). The Tennessee Court of Criminal Appeals recently overruled the summary dismissal of Mr. Bowling's petition for post-conviction relief and ordered a hearing regarding whether Mr. Bowling received effective assistance of counsel during his 1995 arson trial. *Bowling v. State*, No. E2000-02247-CCA-R3-PC, 2001 WL 242581 (Tenn. Crim. App. Mar. 12, 2001) (No Tenn. R. App. P. 11 application filed).

<sup>2</sup>*Bowling v. Goff*, No. E1998-00820-COA-R3-CV, 2000 WL 336664 (Tenn. Ct. App. Mar. 30, 2000), *perm. app. denied* (Tenn. Sept. 25, 2000).

September 1999 violated the Board's policies and procedures and infringed upon his due process and equal protection rights. After an unexplained five-month delay, the Office of the Attorney General moved to dismiss Mr. Bowling's petition "because the Petitioner has failed to state a claim upon which relief can be granted."<sup>3</sup> On December 4, 2000, the trial court filed a lengthy order. After addressing the substance of Mr. Bowling's constitutional claims, the trial court granted the Board's motion to dismiss. Mr. Bowling has appealed.

## II.

No prisoner has a right to be released on parole prior to the expiration of his or her sentence. *Robinson v. Traughber*, 13 S.W.3d 361, 364 (Tenn. Ct. App. 1999). Parole is a privilege, Tenn. Code Ann. §§ 40-28-117(a), 40-35-503(b) (1997), and the power to decide to release a prisoner on parole rests with the Tennessee Board of Paroles, not the courts. *Hopkins v. Tennessee Bd. of Paroles & Probation*, 60 S.W.3d 79, 82 (Tenn. Ct. App. 2001). Accordingly, because parole decisions are entirely discretionary, *Richardson v. Tennessee Dep't of Correction*, 33 S.W.3d 818, 820 (Tenn. Ct. App. 2000); *Daniels v. Traughber*, 984 S.W.2d 918, 924 (Tenn. Ct. App. 1998), the only vehicle for obtaining judicial review of the Board's decisions is a common-law writ of certiorari. *Thandiwe v. Traughber*, 909 S.W.2d 802, 803 (Tenn. Ct. App. 1994).

The common-law writ of certiorari is considered an extraordinary remedy that is not available as of right. *Utley v. Rose*, 55 S.W.3d 559, 563 (Tenn. Ct. App. 2001); *Blackmon v. Tennessee Bd. of Paroles*, 29 S.W.3d 875, 878 (Tenn. Ct. App. 2000). It should only be granted when, in the words of Tenn. Code Ann. § 27-8-101 (2000), "there is no other plain, speedy, or adequate remedy." *Fite v. State*, 925 S.W.2d 543, 544 (Tenn. Ct. App. 1996). While the statutory requirement that the person seeking the writ have no other plain, speedy, or adequate remedy does not impose strict "finality" or "exhaustion of remedies" requirements on petitions for writs of common-law certiorari,<sup>4</sup> it reflects a reviewing court's prudential obligation to stay its hand and to decline to disrupt on-going

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<sup>3</sup>This motion, like most of the motions filed by the Civil Rights and Claims Division fails to comply with the rudimentary requirements of motion practice under the Tennessee Rules of Civil Procedure. In terms that even first-year law students can understand, Tenn. R. Civ. P. 7.02(1) requires that motions must "state with particularity the grounds therefor." For the purposes of a Tenn. R. Civ. P. 12.02(6) motion, this means that the moving party must state in its motion why the plaintiff has failed to state a claim for which relief can be granted. We have repeatedly reminded the Attorney General that including the grounds for a Tenn. R. Civ. P. 12.02(6) motion in a separate memorandum of law does not comply with Tenn. R. Civ. P. 7.02(1). *Hickman v. Tennessee Bd. of Paroles*, \_\_\_ S.W.3d \_\_\_, \_\_\_, 2001 WL 1222259, at \*1, n.2 (Tenn. Ct. App. Oct. 16, 2001); *Pendleton v. Mills*, \_\_\_ S.W.3d \_\_\_, \_\_\_, 2000 WL 1089503, at \*2, n.7 (Tenn. Ct. App. 2001); *Robinson v. Clement*, 65 S.W.3d 632, 635 n.2 (Tenn. Ct. App. 2001). The motion in this case does not even refer to an accompanying memorandum of law.

<sup>4</sup>Clearly, the courts may grant a writ of common-law certiorari to review an interlocutory decision. *Boyce v. Williams*, 215 Tenn. 704, 713, 389 S.W.2d 272, 276 (1965) (holding that a final judgment is not a prerequisite to granting a common-law writ of certiorari); *State ex rel. McMorrough v. Hunt*, 137 Tenn. 243, 248, 192 S.W. 931, 932 (1917) (holding that the use of the writ does not depend on the final nature of the decree); *State v. Womack*, 591 S.W.2d 437, 441 (Tenn. Ct. App. 1979) (upholding the use of a common-law writ of certiorari to review a pre-trial action of a juvenile court).

proceedings when timely and adequate relief for the perceived wrong is available either in the ongoing proceeding or elsewhere.

Decisions either to grant or to deny a petition for writ of certiorari are ordinarily based on the allegations in the petition, although the reviewing court may, in its discretion, conduct a hearing before granting the writ. Accordingly, the petition itself must contain sufficient factual allegations to demonstrate that the party seeking the writ is entitled to extraordinary relief. *Buell Gray Motors, Inc. v. Fanburg's Garage*, 202 Tenn. 648, 650, 308 S.W.2d 410, 411 (1957); *City of Nashville v. Patton*, 125 Tenn. 361, 369, 143 S.W. 1131, 1133 (1911); *Kennedy v. Farnsworth*, 22 Tenn. (3 Hum.) 242, 244 (1842) (holding that a petition for writ of certiorari is “a statement of fact with a view to obtain an order for issuance of the writs of *certiorari* and *supersedeas*”). Parties opposing the issuance of a writ of certiorari may move to dismiss or to quash the petition<sup>5</sup> by filing a motion specifying the particular grounds for dismissal. *City of Nashville v. Mason*, 11 Tenn. App. 344, 351 (1930). In the absence of a record, these motions, like Tenn. R. Civ. P. 12.02(6) motions, admit the truth of the factual statements in the petition. *Royal Clothing Co. v. Holloway*, 208 Tenn. 572, 574, 347 S.W.2d 491, 492 (1961); *Wilson v. Moss*, 54 Tenn. (7 Heisk.) 417, 419 (1872); *Wilson v. Lowe*, 47 Tenn. (7 Cold.) 153, 157 (1896).

In this case, the trial court should have dismissed Mr. Bowling's petition for two reasons. First, it does not comply with Tenn. Code Ann. § 27-8-106 which requires a petition for a common-law writ of certiorari to be verified and to state that it is the first application for the writ. *Depew v. Kings, Inc.*, 197 Tenn. 569, 571, 276 S.W.2d 728, 729 (1955); *Rhea County v. White*, 163 Tenn. 388, 397, 43 S.W.2d 375, 378 (1931); *Drainage Dist. No. 4 of Madison County v. Askew*, 138 Tenn. 136, 137, 196 S.W. 147, 148 (1917).<sup>6</sup> Second, it does not contain facts demonstrating that Mr. Bowling lacked another “plain, speedy, or adequate remedy.” If anything, Mr. Bowling's petition demonstrates convincingly that he could have obtained the same relief from the Board that he is seeking from the courts.

A hearing officer's recommendations regarding parole are not binding on the Board. Tenn. Comp. R. & Regs. r. 1100-1-1-.07(2)(a) (1999). A prisoner convicted of a non-violent crime cannot be paroled unless three members of the Board concur, Tenn. Code Ann. § 40-28-105(d)(3) (Supp. 2001), while a prisoner convicted of a violent crime must have the concurrence of four members of the Board. Tenn. Code Ann. § 40-28-105(d)(4). If the Board denies parole, the prisoner may request an “appellate review” by the Board (1) to review new evidence that was not available at the time of

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<sup>5</sup>*Livingston v. State*, No. M1999-01138-COA-R3-CV, 2001 WL 747643, at \*4 (Tenn. Ct. App. July 5, 2001) (No Tenn. R. App. P. 11 application filed).

<sup>6</sup>Parties who act as their own lawyer are entitled to fair and equal treatment. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000). However, the courts may not prejudice the substantive rights of the other parties in order to be “fair” to parties representing themselves. Prisoners and other non-lawyers who represent themselves are not excused from complying with the same applicable substantive and procedural law that represented parties must comply with. *Hodges v., Tennessee Att'y Gen.*, 43 S.W.3d 918, 920 (Tenn. Ct. App. 2000); *Kaylor v. Bradley*, 912 S.W.2d 728, 733 n.4 (Tenn. Ct. App. 1995).

the hearing, (2) to consider substantial misconduct by the hearing officer, or (3) to review “significant procedural errors” by the hearing officer. Tenn. Comp. R. & Regs. r. 1100-1-1-.07(3)(c).

Mr. Bowling’s petition does not clearly state that the Board initially concurred with the hearing officer’s recommendation that he be denied parole. However, in light of his factual allegations regarding his “appeal” in October 1999, we will presume, in absence of a record, that three members of the Board declined to parole him following the September 9, 1999 hearing and that Mr. Bowling thereafter pursued “appellate review” by the Board under Tenn. Comp. R. & Regs. r. 1100-1-1-.07(3)(c). By Mr. Bowling’s own admission, the Board had not acted on his request for appellate review when he filed his petition.

Mr. Bowling filed his petition for common-law writ of certiorari to remedy what he perceived to be misconduct and significant procedural errors committed by the hearing officer during his parole hearing. Claims of this sort are precisely the types of errors that the Board may consider in an “appellate review” proceeding under Tenn. Comp. R. & Regs. r. 1100-1-1-.07(c)(2), (3). Thus, in light of the fact that Mr. Bowling’s request for appellate review was pending before the Board when he filed his petition for writ of common-law certiorari, the trial court should have concluded that Mr. Bowling was not entitled to the issuance of a writ of certiorari because his petition had failed to demonstrate that he was without another “plain, speedy, and adequate remedy.”

### III.

We affirm the order dismissing Mr. Bowling’s petition for common-law writ of certiorari, albeit on grounds different from those relied upon by the trial court<sup>7</sup> and remand the case to the trial court for whatever further proceedings consistent with this opinion may be required. We also tax the costs of this appeal to Timothy V. Bowling for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., JUDGE

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<sup>7</sup>The Court of Appeals may affirm a judgment on different grounds than those relied on by the trial court when the trial court reached the correct result. *Continental Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 789 (Tenn. Ct. App. 1999); *Allen v. National Bank of Newport*, 839 S.W.2d 763, 765 (Tenn. Ct. App. 1992); *Clark v. Metropolitan Gov’t*, 827 S.W.2d 312, 317 (Tenn. Ct. App. 1991).